



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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August 17, 2004

Ref: 8EPR-EP

Dennis R. Fewless, Director  
Division of Water Quality  
North Dakota Department of Health  
1200 Missouri Avenue  
P.O. Box 5520  
Bismarck, ND 58506-5520

Re: Clean Water Act Section 303(d) Total Maximum  
Daily Load (TMDL) Waterbody List

Dear Mr. Fewless:

Thank you for your submittal of North Dakota's year 2004 Integrated Water Quality Assessment Report dated May 27, 2004. EPA has conducted a complete review of the Clean Water Act Section 303(d) waterbody list and supporting documentation and information included in the integrated report. Based on this review, EPA has determined that North Dakota's 2004 list of water quality limited segments (WQLSs) still requiring TMDLs meets the requirements of Section 303(d) of the Clean Water Act (CWA) and EPA's implementing regulations. Therefore, by this order, EPA hereby APPROVES North Dakota's Section 303(d) list. Please see the enclosure for a description of the statutory and regulatory requirements and a summary of EPA's review of North Dakota's compliance with each requirement.

EPA's approval of North Dakota's Section 303(d) list extends to all waterbodies in category 5 of the list (i.e., Tables VI-1 to VI-4) with the exception of those waters that are within Indian Country, as defined in 18 U.S.C. Section 1151. EPA is taking no action to approve or disapprove the State's list with respect to those waters at this time. EPA, or eligible Indian Tribes, as appropriate, will retain responsibilities under Section 303(d) for those waters.

The public participation process sponsored by the North Dakota Department of Health included publishing display ads in newspapers across the State requesting public input in developing the draft list and requesting water quality data, official public notices on the list availability, use of the North Dakota Department of Health website, and a mailing to many entities asking for both comments and additional data or information on waters. We commend the State for its thorough public participation process.

We wish to inform you that, in accordance with Section 7 of the Endangered Species Act, our office has received concurrence from the U.S. Fish and Wildlife Service for our biological evaluation written to address the approval of the State's year 2004 Section 303(d) waterbody list. In our biological evaluation we assessed the effects of our approval on the threatened, endangered, proposed, and candidate species throughout the State. Our conclusion was that our approval of the State's list would not likely have an adverse effect on the species of concern. Any effect of the list approval was seen as either insignificant or beneficial to the species.

Under current regulations, the next Section 303(d) list is required to be submitted on April 1, 2006. We suggest you stay abreast of EPA TMDL guidance development in the months to come in the event of any changes to that date. Although current regulations require lists to be submitted every 2 years, in April of even years, states may submit Section 303(d) lists more frequently as they deem necessary. All additions, deletions and modifications to the list will require EPA approval.

Again, thank you for the efforts related to the good job of developing the Section 303(d) TMDL waterbody list for the 2004-2006 biennium. If you have questions on any of the above information, feel free to give me, or Vern Berry (303-312-6234) of my staff, a call.

Sincerely,



Max H. Dodson

Assistant Regional Administrator

Office of Ecosystems Protection and  
Remediation

Enclosure

# Review of North Dakota's 2004 Section 303(d) Waterbody List

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*Attachment to letter from Max H. Dodson, Assistant Regional Administrator,  
Office of Ecosystems Protection and Remediation, US EPA, Region VIII to Dennis R. Fewless, Director,  
Division of Water Quality, North Dakota Department of Health*

Date of Transmittal Letter from State: May 27, 2004  
Date of Receipt by EPA: June 1, 2004

## **I. Introduction**

The purpose of this review document is to describe the rationale for EPA's approval of North Dakota's year 2004 Section 303(d) waterbody list. The following sections identify those key elements to be included in the list submittal based on the Clean Water Act (CWA) and EPA regulations. See 40 CFR 130.7. In July 2003, EPA issued guidance for integrating the development and submission of 2004 Section 305(b) water quality reports and Section 303(d) lists of impaired waters. See EPA's Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Section 303(d) and 305(b) of the Clean Water Act, July 21, 2003. This guidance recommends that states develop an integrated report of the quality of their waters by placing all waters into one of five assessment categories. By following this guidance, category 5 of the integrated report is the State's Section 303(d) list. EPA's action in review and approval of this document is only for those waters included in category 5 that comprise the Section 303(d) list within the integrated report.

EPA reviewed the methodology used by the State in developing the Section 303(d) list and the State's description of the data and information it considered. EPA's review of North Dakota's Section 303(d) list is based on EPA's analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

North Dakota's 2004 list is considered an update of the State's 2002 list. The Section 303(d) list that EPA is approving today is comprised of 211 waterbodies, compared with 180 waterbodies included on the 2002 list. States may add and take waters off their Section 303(d) lists based on several factors. For the year 2004 Section 303(d) list North Dakota added 41 waterbodies and delisted 10 waterbodies.

## **II. Statutory and Regulatory Background**

### **A. Identification of Water Quality Limited Segments (WQLSs) for Inclusion on Section 303(d) List**

Section 303(d)(1) of the Act directs states to identify those waters within its jurisdiction for which effluent limitations required by Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The Section 303(d) listing requirement applies to waters impaired by point and/or nonpoint sources, pursuant to EPA's long-standing interpretation of Section 303(d).

EPA regulations provide that states do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the Act, (2) more stringent effluent limitations required by state or local authority, and (3) other pollution control requirements required by state, local, or federal authority. See 40 CFR 130.7(b)(1).

### **B. Consideration of Existing and Readily Available Water Quality-Related Data and Information**

In developing Section 303(d) lists, states are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the state's most recent Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any Section 319 nonpoint assessment submitted to EPA. See 40 CFR 130.7(b)(5). In addition to these minimum categories, states are required to consider any other data and information that is existing and readily available. EPA's 1991 Guidance for Water Quality-Based Decisions describes categories of water quality-related data and information that may be existing and readily available. See Guidance for Water Quality-Based Decisions: The TMDL Process, EPA Office of Water, 1991, Appendix C ("EPA's 1991 Guidance"). While states are required to evaluate all existing and readily available water quality-related data and information, states may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring states to assemble and evaluate all existing and readily available water quality-related data and information, EPA regulations at 40 CFR 130.7(b)(6) require states to include, as part of their submissions to EPA, documentation to support decisions to rely or not rely on particular data and information and decisions to list or not list waters. Such

documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the Region.

### **C. Priority Ranking**

EPA regulations also codify and interpret the requirement in CWA Section 303(d)(1)(A) that states establish a priority ranking for listed waters. The regulations at 40 CFR 130.7(b)(4) require states to prioritize waters on their Section 303(d) lists for total maximum daily load (TMDL) development, and also to identify those water quality-limited segments (WQLSs) targeted for TMDL development in the next two years. In prioritizing and targeting waters, states must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. See CWA Section 303(d)(1)(A). As long as these factors are taken into account, the CWA provides that states establish priorities. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs such as wasteload allocations for permits, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and state or national policies and priorities. See 57 FR 33040, 33045 (July 24, 1992), and EPA's 1991 Guidance.

## **III. Analysis of North Dakota's Submission**

### **A. Background**

EPA has reviewed the North Dakota's submission, and has concluded that the State developed its Section 303(d) list in compliance with CWA Section 303(d) and 40 CFR 130.7. EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed. In July 2003, EPA issued guidance for integrating the development and submission of 2004 Section 305(b) water quality reports and Section 303(d) lists of impaired waters. See EPA's Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act, July 21, 2003. This guidance recommends that states develop an integrated report of the quality of their waters by placing all waters into one of five assessment categories. By following this guidance, category 5 of the integrated report is the State's Section 303(d) list. EPA's action in review and approval of this document is only for those waters in categories 5 that comprise the Section 303(d) list.

The State's list was submitted to EPA Region VIII enclosed with correspondence dated May 27, 2004 from Dennis R. Fewless, Director, Division of Water Quality, North Dakota Department of Health, in a document entitled "*North Dakota 2004 Integrated Section 305(b) Water Quality Assessment Report and Section 303(d) List of Waters Needing Total Daily Maximum Loads.*"

The year 2004 integrated report submitted to EPA, from NDDH consisted of the following portions that are necessary for the Section 303(d) waterbody list:

- **Waterbodies and corresponding pollutants that make up the State's Section 303(d) list** - See waters and pollutants identified in Tables VI-1, 2, 3, and 4 (i.e., the *2004 List of Section 303(d) TMDL Waters*, in the Souris, Red, Missouri and James River Basins - pages VI-5 through VI-39);
- **Prioritization of waterbodies for TMDL development** - See explanation in Part VI.B., pages VI-2 and 3, and the TMDL priorities for each waterbody in the last column of Tables VI-1, 2, 3, and 4; and
- **Identification of waters targeted for TMDL development over the next biennium** - See the priority 1A description in Part VI.B., and the TMDL Priority 1A waters listed in last column of Tables VI-1, 2, 3, and 4.

EPA's approval action on NDDH's year 2004 Section 303(d) list extends only to the items listed immediately above (i.e., the waterbodies and corresponding pollutants listed), the prioritization of waterbodies for TMDL development, and the identification of waters targeted for TMDL development over the 2004-2006 biennium.

In addition to the Section 303(d) list described above, NDDH also submitted the following to EPA, which EPA has neither approved nor disapproved:

- an executive summary and introduction (pages I-1 to II-2);
- a background describing the state waters (pages III-1 to III-3);
- a description of the methodology the State used to assign waters to the five categories recommend by EPA (pages IV-1 to IV-21);
- a description of the Section 305(b) water quality assessment (pages V-1 to V-11);
- a description and itemization of the waters delisted from the 2002 Section 303(d) list (page VI-4 and Table VI-5, pages VI-41 to 50);
- a proposed schedule for completion of TMDLs (page VI-51);
- a description of the public participation process and a summary of comments received by the State on the Section 303(d) list as well as the State's responses to comments (page VI-3, and Appendices F and G); and
- the surface water quality monitoring schedule and sampling site description (pages VI-51 to 56).

After reviewing North Dakota's year 2004 list, EPA has concluded that the waters added to the list were based on data and information consistent with the State's listing methodology. Further, EPA has concluded that waters taken off the list were done so because TMDLs were developed or the State correctly determined that TMDLs were no longer needed.

The 2004 Section 303(d) waters are found in the following tables in the State's submittal:

- Table VI-1 - 2004 List of Section 303(d) TMDL Waters for the Souris River Basin;
- Table VI-2 - 2004 List of Section 303(d) TMDL Waters for the Red River Basin;
- Table VI-3 - 2004 List of Section 303(d) TMDL Waters for the Missouri River Basin;
- Table VI-4 - 2004 List of Section 303(d) TMDL Waters for the James River Basin;

These tables include the following information for each waterbody: the assessment unit identifier, the assessment unit description, the assessment unit size, the designated use that is threatened or impaired, the use support determination, the pollutant parameter(s) of concern, and the priority for developing TMDLs.

North Dakota properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with Section 303(d) and EPA guidance. Section 303(d) lists are to include all WQLSs still needing TMDLs, regardless of whether the source of the impairment is a point and/or nonpoint source. EPA's long-standing interpretation is that Section 303(d) applies to waters impacted by point and/or nonpoint sources. This interpretation has been described in EPA guidance. See EPA's April 1991 Guidance and National Clarifying Guidance for 1998 Section 303(d) Lists, Aug. 27, 1997. Also, in *Pronsolino v. Marcus*, the District Court for the Northern District of California held that Section 303(d) of the CWA authorizes EPA to identify and establish total maximum daily loads (TMDLs) for waters impaired by nonpoint sources. *Pronsolino et al. v. Marcus et al.*, 91 F.Supp.2d 1337, 1347 (N.D.Ca. 2000). In addition, this interpretation of Section 303(d) is described in detail in a May 23, 1997, memorandum from Geoffrey Grubbs, Director of the Assessment and Watershed Protection Division, EPA Office of Water, to the FACA Workgroup on Section 303(d) Listing Criteria<sup>1</sup>. See Memorandum from Geoffrey H. Grubbs, Director, Assessment and Watershed Protection Division, to FACA Workgroup on Section 303(d) Listing Criteria, "Nonpoint Sources and Section 303(d) Listing Requirements", May 23, 1997. See also Memorandum from Robert Perciasepe, Assistant Administrator, Office of Water, to Regional Administrators and Regional Water Division Directors, "New Policies for Establishing and Implementing TMDLs," August 8, 1997.

## **B. Identification of Waters and Consideration of Existing and Readily Available Water Quality-Related Data and Information**

EPA has reviewed North Dakota's description of the data and information it considered for identifying waters on the Section 303(d) list. EPA concludes that the State properly assembled and evaluated all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR 130.7(b)(5). In particular, the State relied on information from the year 2004 §305(b) water quality assessments, assessments performed under the 319 non-point source program, as well as data and information

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<sup>1</sup> EPA convened a Federal Advisory Committee Act (FACA) Committee in November 1996. The report of this FACA committee is found in EPA document EPA 100-R-98-006 (July 1998).

obtained through an extensive process to solicit information from state, federal and citizen sources. The State's evaluation of data and information in each of these categories is described below.

- *Waters identified by the state in its most recent section 305(b) report as "partially meeting" or "not meeting" designated uses or as "threatened" (§130.7(b)(5)(i)).*

EPA's 2004 integrated report guidance suggests that states combine their previously separate Sections 305(b) and 303(d) reports. North Dakota produced a 2004 integrated report using EPA's guidance, therefore the regulatory reference to the use of information from the Section 305(b) report is no longer relevant now that the two reports are combined into one. However, North Dakota's 2004 integrated report does include waters which would previously have been included in the Section 305(b) report. Further, the 2004 integrated report guidance no longer uses the terminology "partially meeting, not meeting or threatened." EPA's integrated report guidance suggests that states place waters in categories which represent the varying levels of water quality standards attainment. These levels range from category 1, where all of the water's designated uses are met, to category 5, where a pollutant impairs a water and a TMDL is required. North Dakota made the category determinations based on consideration of all existing and readily available data and information consistent with the State's assessment methodology and EPA's guidance.

In developing its Section 303(d) list, North Dakota relied on both evaluated and monitoring assessments. Evaluated assessments are typically based on information other than biological, chemical, or physical field monitoring efforts. Evaluated assessments in North Dakota were based on information such as land use information, known locations of pollutant sources, spill or fish kill incidents, water quality information provided by local residents or resource managers, water quality monitoring data over five years old, and data extrapolated from adjacent waterbodies. Monitored assessments were based on physical, chemical, or biological data collected within the last five years for rivers and within the last ten years for lakes. The physical and chemical monitoring data came primarily from the U.S. Geological Survey and from the North Dakota Department of Health.

Special attention should be given to North Dakota's biological monitoring efforts. The State used macroinvertebrate data for assessing aquatic life use to assign waterbodies to categories 1-5 for the integrated report. Data include community-based structure and function of both fish and macroinvertebrates. Also, the State performs fish tissue analysis as part of its program. This biological information was used in development of the integrated report.

EPA concludes that North Dakota made Section 303(d) listing decisions consistent with results from the Section 305(b) assessment, utilizing all existing and



readily available data and information, in development of its 2004 Section 303(d) waterbody list.

- *Waters for which dilution calculations or predictive models indicate non-attainment of applicable water quality standards (§130.7(b)(5)(ii)).*

Waters where the State had existing and readily available information regarding dilution calculations or predictive modeling results were considered for listing on the Section 303(d) list.

EPA concludes that North Dakota properly considered waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards in development of its 2004 Section 303(d) waterbody list.

- *Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions (§130.7(b)(5)(iii)).*

The State solicited data and information from a wide array of federal, state, local and non-profit organizations in preparation of the year 2004 Section 303(d) list. The State also solicited comments on its draft Section 303(d) list and only received comments from EPA. The State did not receive any comments on specific waterbodies that should be included on the list from organizations and citizens solicited during the public participation period. However, NDDH acquired and considered data collected by the U.S. Geological Survey. Data for all waters were evaluated using the State's integrated report methodology and assigned to one of the assessment categories 1-5.

EPA concludes that North Dakota properly considered waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions in development of its 2004 Section 303(d) waterbody list.

- *Waters identified by the state as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment (§130.7(b)(5)(iv))*

North Dakota has achieved consistency between its nonpoint source assessments and its Section 303(d) waterbody list. North Dakota uses the Assessment Database (ADB), developed by EPA, to manage water quality assessment information for the State's rivers, streams, lakes, and reservoirs. Assessments completed and entered into the ADB also form the basis for the State's Section 319 Nonpoint Source (NPS) Assessment Report and Management Plan. Therefore, through the use of the ADB, there is complete integration of the State's Section 303(d) TMDL list, the Section 319 NPS Assessment Report and Management Plan, and the Section 305(b) report.

EPA concludes that North Dakota properly considered waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under Section 319 of the CWA and any updates of the assessment in development of its 2004 Section 303(d) waterbody list.

### **C. Delisting of Waters**

According to EPA regulations, each state must demonstrate good cause for not including a water or waters on the list. See 40 CFR 130.7(b)(6)(iv). The State identified the criteria for removing waters from the 2002 list on page VI-4, Delisting of 2002 Listed TMDL Waters in the State's year 2004 Section 303(d) list submittal. This information includes the rationale for not including the waters on the 2004 list. These reasons include:

- The most recent data assessment indicates that the waterbody is supporting all of its designated beneficial uses.
- Use impairment is due to a non-pollutant (e.g., habitat).
- There is a lack of sufficient credible data and/or information to make a use support determination.

A full accounting of the 10 waters delisted from the 2002 list is provided in Table VI-5 (pages VI-41 to VI-50). This table includes a column that provides a detailed good cause reason for delisting each of the waters. For almost all the waters that were delisted, the decisions to take the waters off the list were based on recent data indicating full support of designated uses, a TMDL was completed and approved by EPA, or there is a lack of credible data and/or information. The table also describes the rationale for re-listing specific waters and pollutants from the 1998 Section 303(d) list (i.e., many of the waters in Table VI-5 are being re-listed in 2004).

In many cases when North Dakota delisted a waterbody due to a lack of sufficient credible data it was due to the original assessment being based only on: 1) best professional judgement (BPJ); or 2) data extrapolated from a monitoring station(s) located in an adjacent AU. EPA considers these reasons for delisting to be acceptable. For those waters for which the listing was based on BPJ, these waterbodies were originally listed based on qualitative information, rather than quantitative chemical or biological data. For the waters listed based on extrapolated information the State adequately demonstrated that in these cases, extrapolation was not a reliable indicator of impairment.

EPA acknowledges that states may re-evaluate the waters on their Section 303(d) lists. In a 1997 memorandum, EPA stated that “. . . Regions and states should keep in mind that

waterbodies may be added or subtracted over time as new lists are developed.”<sup>2</sup> Accordingly, in the July 21, 2003 guidance for preparing the 2004 Integrated Report, EPA identified several conditions that allow states to remove previously-listed waters from Section 303(d) lists. In addition to delisting a waterbody when a TMDL has been established for it, states may delist a waterbody when:

- 1) the waterbody is meeting all applicable water quality standards or is expected to meet these standards in a reasonable time frame (e.g., two years) as a result of implementation of required pollutant controls or
- 2) if, upon re-examination, the original basis for listing is determined to be inaccurate.<sup>3</sup>

Further, the existing EPA regulations require states, at the request of the Regional Administrator, to demonstrate good cause for not including waterbodies on their lists. Good cause includes, but is not limited to, more recent and accurate data, more sophisticated water quality modeling, flaws in the original analysis that led to the waterbody being listed, or changes in conditions, (e.g., new control equipment, or elimination of discharges). See 40 CFR 130.7(b)(6)(iv).

In its review of the State’s year 2004 waterbody list, EPA took special care to review the methodology and resultant delistings from North Dakota’s list. In its preamble to the March 31, 2000 Federal Register notice, EPA stated that:

“... EPA intends to carefully review any proposed removal of a waterbody from a Section 303(d) list to ensure there is information specific to the waterbody to support the removal. 65 FR 4921. In particular, where a waterbody was previously listed based on certain data or information, and the state removes the waterbody without developing or obtaining any new information, EPA will carefully evaluate the state’s reevaluation of the available information, and would not approve such removals unless the state’s submission describes in detail why it is appropriate under the current regulations to remove each affected waterbody.

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<sup>2</sup> Page 4, August 8, 1997 memorandum from Robert Perciasepe, Assistant Administrator for Water, US EPA, regarding “New Policies for Establishing and Implementing TMDLs.”

<sup>3</sup> August 27, 1997 memorandum from Robert H. Wayland III, Director, Office Wetlands, Oceans, and Watershed, Office of Water, EPA Headquarters, to Water Division Directors, Regions I - X, and Directors, Great Water Body Programs, and Water Quality Branch chiefs, Regions I - X, regarding "National Clarifying Guidance For 2000 State and Territory Section 303(d) Listing Decisions."

EPA has the authority to disapprove the list if EPA identifies existing and readily available information that was existing and readily available at the time the state submitted the list and that data shows that a waterbody does not attain water quality standards.” 65 FR 17168.

Having reviewed North Dakota’s submission and supporting documentation, EPA has concluded that North Dakota has acted reasonably and within the discretion that current EPA regulations allow in delisting waterbodies.

#### **D. Priority Ranking**

EPA regulations at 40 CFR 130.7(b)(4) require states to prioritize waters on their Section 303(d) lists for TMDL development, and also to identify those WQLSs targeted for TMDL development over the next biennium 2004-2006. In prioritizing and targeting waters, states must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. See CWA Section 303(d)(1)(A). As long as these factors are taken into account, the CWA provides that states establish priorities. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and state or national policies and priorities. See 57 FR 33040, 33045 (July 24, 1992), and EPA’s April 1991 guidance listed below.

The State described its prioritization criteria on pages VI-2 and VI-3 of the submittal, and the priority assignments for each waterbody are indicated in the last column of Tables VI-1, 2, 3, and 4. The criteria used by the State is reasonable because it builds on the statutory requirements regarding prioritization criteria. It’s also reasonable because it uses supplemental criteria that is consistent with the guidance provided by EPA. Some of relevant factors the State took into account in assigning priority rankings were waters with a high degree of public support and interest for improvement, and waters with a high likelihood of implementation of the TMDL once its completed. The State’s prioritization criteria defines three categories: Priority 1 waters, Priority 2 waters and Priority 3 waters. Waterbodies listed as Priority 1 have been further categorized. Priority 1A waters are the river and stream segments and lakes and reservoirs for which TMDLs are scheduled to be *completed* within the next two years (i.e., targeted waters). Priority 1B waters are the river and stream segments and lakes and reservoirs for which TMDL development projects are scheduled to be *started* in the next two years. Priority 2 waters are scheduled to be completed in the next 10 years. Priority 3 waters are impaired due to methyl-mercury and are considered a low priority for TMDL development by the State due to several complicating factors including: 1) uncertainty regarding the fate and transport of atmospheric sources of mercury; 2) the complexity of the biological and geochemical interactions which affect the conversion of elemental mercury to methyl-mercury and its bioaccumulation rate in fish; and 3) the interstate and international nature of atmospheric mercury sources. The State recommends that EPA take the lead in developing these priority 3 mercury TMDLs.

EPA reviewed the State's priority ranking of listed waters for TMDL development, and concludes that the State properly took into account the severity of pollution and the uses to be made of such waters, as well as other relevant factors such as expiring surface water discharge permits, imminent human health problems, or local support for water quality improvement. In addition, EPA reviewed the State's identification of WQLSs targeted for TMDL development in the next two years, and concludes that the targeted waters (i.e., those listed by North Dakota as Priority 1A) are appropriate for TMDL development in this time frame.

EPA has received North Dakota's long-term schedule for TMDL development for all waters on the State's 2004 Section 303(d) list. See page VI-51 of the integrated report. As a policy matter, EPA has requested that States provide such schedules. See Memorandum from Robert Perciasepe, Assistant Administrator for Water, to Regional Administrators and Regional Water Division Directors, "New Policies for Developing and Implementing TMDLs", August 8, 1997. EPA is not taking any action to approve or disapprove this schedule pursuant to Section 303(d).

## **E. References**

The following list includes documents that were used directly or indirectly as a basis for EPA's review of the State's Section 303(d) waterbody list. This list is not meant to be an exhaustive list of all records reviewed, but to provide the primary documents the Region relied upon in making its decisions to approve the State's list.

40 CFR Part 130 Water Quality Planning and Management

40 CFR Part 131 Water Quality Standards

December 28, 1978 Federal Register Notice, *Total Maximum Daily Loads Under Clean Water Act*, finalizing EPA's identification of pollutants suitable for TMDL calculations, 43 Fed. Reg. 60662.

January 11, 1985 Federal Register Notice, *40 CFR Parts 35 and 130, Water Quality Planning and Management: Final Rule*, 50 Fed. Reg. 1774

April 1991, "Guidance for Water Quality-Based Decisions: The TMDL Process," EPA 440/4-91-001.

July 24, 1992 Federal Register Notice, *40 CFR Parts 122, 123, 130*, revision of regulation, 57 Fed. Reg. 33040

August 13, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to EPA Water Quality Branch Chiefs, Regions I - X and TMDL Coordinators, Regions I - X, regarding "Supplemental Guidance on

Section 303(d) Implementation."

October 30, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, regarding "Approval of 303(d) Lists, Promulgation Schedules/Procedures, Public Participation."

September, 1997 guidance from Office of Water, Headquarters, US EPA regarding Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports) and Electronic Updates: Supplement, EPA-841-B-97-002B

September 12, 1997 letter from Carol L. Campbell, Director, Ecosystems Protection Program, Office of Ecosystems Protection & Remediation, US EPA, Region VIII to Dennis Fewless, Director, Division of Water Quality, State Department of Health and Consolidated Laboratories regarding "Transmittal of TMDL Guidance."

February 4, 1998 letter from Max H. Dodson, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, US EPA, Region VIII to J. David Holm, Director, Water Quality Control Division, Colorado Department of Public Health and Environment and Region VIII Water Quality Directors (including Dennis Fewless, Director, Division of Water Quality, North Dakota Department of Health) regarding "303(d) Listing Requirements; Expiring Permits."

August 23, 1999 64 Federal Register 46012 Proposed Revisions to the Water Quality Management and Planning Regulations.

April 27, 2000, 65 FR 24641, EPA Review and Approval of State and Tribal Water Quality Standards.

May 20, 2002 memorandum from Charles H. Sutfin, Director, Assessment and Watershed Protection Division, US EPA to Water Quality Branch Chiefs, TMDL Coordinators, Monitoring Coordinators, and ORC TMDL Attorneys (Regions I - X) regarding "EPA Review of 2002 Section 303(d) Lists and Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992"

July 21, 2003 memorandum from Diane Regas, Director, Office of Wetlands, Oceans, and Watersheds, US EPA to Water Division Directors transmitting EPA's "Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act"

March 31, 2004 letter from Dennis R. Fewless, Director, Division of Water Quality, North Dakota Department of Health to Robert E. Roberts, Regional Administrator, EPA Region VIII regarding transmittal of the final draft "North Dakota 2004 Integrated Section 305(b) Water

Quality Assessment Report and Section 303(d) List of Waters Needing Total Maximum Daily Loads,” for public comment.

April 28, 2004 letter from Karen Hamilton, Chief Water Quality Unit, US EPA Region VIII, to Dennis R. Fewless, Director, Division of Water Quality, North Dakota Department of Health regarding EPA’s comments on North Dakota’s 2004 draft Integrated Report.

May 27, 2004 letter from Dennis R. Fewless, Director, Division of Water Quality, North Dakota Department of Health to Robert E. Roberts, Regional Administrator, EPA Region VIII regarding transmittal of the “North Dakota 2004 Integrated Section 305(b) Water Quality Assessment Report and Section 303(d) List of Waters Needing Total Maximum Daily Loads.”

June 9, 2004 letter from Karen Hamilton, Chief Water Quality Unit, US EPA Region VIII, to Jeffrey Towner, Field Supervisor, US Fish and Wildlife Service, Bismarck North Dakota regarding “Request for Concurrence on Section 7 (ESA) Findings, North Dakota’s Year 2004 Section 303(d) Waterbody List.”

July XX, 2004 letter from Jeffrey Towner, Field Supervisor, US Fish and Wildlife Service, Bismarck North Dakota, to Karen Hamilton, Chief Water Quality Unit, US EPA Region VIII, regarding “Concurrence on Section 7 (ESA) Findings, North Dakota’s Year 2004 Section 303(d) Waterbody List.”